

**BEFORE THE THREE MEMBER DUE PROCESS  
HEARING PANEL EMPOWERED BY THE MISSOURI  
STATE BOARD OF EDUCATION PURSUANT TO  
SECTION 162.961 RSMo**

, and	)	
,	)	
Petitioners,	)	
v.	)	
ST. LOUIS CITY PUBLIC	)	
SCHOOL DISTRICT,	)	
Respondent.	)	

**DECISION**

**ISSUES**

The issue presented in this case is based on the School District attempt to place Student in the Missouri State School for the Blind, and whether FAPE was provided by the District before and after such action was attempted. Further analysis of this Panel included whether the District provided all available and necessary accommodations and evaluations.

**RESPONDENT’S MOTION TO DISMISS**

Having examined the Respondent’s (hereafter “District”) Motion to Dismiss the matter before us, as a matter of law, I, the Chairperson of the Panel, overrule said Motion to Dismiss, for reasons that will be specified in this Decision.

## **FINDINGS OF FACT**

1. The pre-hearing conference of this matter was convened at 8:30 AM CDT, on July 29, 2004, at a location in downtown St. Louis, Missouri, 801 North 11<sup>th</sup> Street, Room 3-1, St. Louis, MO 63101. Counsel for the District, Ms. Margaret M. Mooney, and counsel for the Petitioners, Mr. Jay R. Anielak were present. Panel members Lee Andrews and Rand Hodgson, as well as Panel Chairperson David Potashnick were also present.
2. At the pre hearing conference, the Petitioners declared the hearings to be open to the public, and produced for the record Petitioners' Motion to Dismiss this Due Process Request as a matter of law. This Motion was taken under advisement at that time. Scheduling and order of appearance of witnesses was discussed and agreement was reached on these matters by Counsel for both sides.
3. (hereafter "Student") is a child diagnosed with multiple disabilities, born on. This Due Process Request was filed April 22, 2004. Student is and has at all times relevant to these proceedings been a resident of the Metropolitan School District for the City of St. Louis. The District is not a part of any Special School District, and was created pursuant to Section 162.621 RSMo.
4. Student has the medical diagnoses of Tuberous Sclerosis, Intractable Minor Epilepsy with mental retardation and Cortical Vision Impairment. (Resp. Ex. 5a)
5. All exhibits compiled and exchanged pre hearing by District and Student were admitted into evidence without objection. (Tr. pp. 509-512)
6. An IEP that was prepared and accepted by all parties dated October 13, 2001 served as the IEP Student was served under until the end of the 2003-2004 school year. (Tr. pp. 45-46)
7. Student was unable to fully benefit from Early Childhood Special Education from April 2002 to the summer of 2003, and she received no ESY services during the summers of 2002 or 2003. (Tr. pp. 32, 39)

8. An IEP meeting for Student was held September 10, 2002, but Student's parent did not attend. (Pet. Ex. H, p. 37)
9. The proposed IEP from September 2002 was never implemented, and the IEP that Student had been served under since at least the preceding year was copied, provided a new cover page dated September 10, 2002, and Student continued to be served under the previous IEP. (Tr. p. 351)
10. The IEP with the cover page dated September 10, 2002 called for a Behavior Management Plan and a Functional Behavioral Assessment. The Behavior Management Plan was not provided that school year. (Tr. p. 38)
11. Student did not receive ESY services the summer of 2003. (Tr. p. 39)
12. The September 2001 IEP was that controlling the Student's curriculum from the time it was approved until the end of the 2003-2004 school year. ( Tr. pp. 45, 46)
13. On or about August 1, 2003, District became aware, through the correspondence of even date from one Dr. Cruz, that Student had been diagnosed with marked Cortical Visual Impairment (CVI), in addition to her other already diagnosed disabilities. (Tr. p. 95, Resp. Ex. 15)
14. Other reevaluations were conducted on Student during this approximate time period. These include: Augmentative Communication Assessment by St. Louis Hearing and Speech, dated April 29, 2003 (Tr. pp. 438-442, Pet. Ex. 23); and an Augmentative Communication Assessment by Dr. Gail Rice, dated June 8, 2004 (Tr. p. 197; Resp. Ex. 5a).
15. Student's parent rejected the ACA by St. Louis Hearing and Speech and requested an ACA by Dr. Rice at a Reevaluation Hearing Conference held June 26, 2003. (Resp. Ex. 20,21)
16. During the time of these reevaluations mentioned in the two preceding paragraphs, Student was in the classroom of one Maureen Moore. (Tr. p. 241) Ms. Moore had been Student's classroom teacher in the school years of 2002-2003 and 2003-2004. (Id.)
17. Student has progressed since the implementation of behavioral management tools and other resources the District has applied has provided pursuant to

DESE's demands as a result of the Child Complaint filed by Student's Mother. (Tr. p. 286)

18. Ms. Jane Herder, teacher for the visually impaired, orientation and mobility specialist for District, testified that Student could be pulled out of the classroom and directly instructed on IEP goals, and that this is a service that Ms. Herder provides at District. (Tr. p. 145)
19. Direct services through interactive vision services for Student were recommended by Ms. Herder of the IEP team in the proposed January 2004 IEP for Student. (Tr. p. 146)
20. Direct service through interactive vision services was not provided to Student at District. (Tr. p. 150)
21. District witness Ms. Rosalie Buscher, an employee of District, testified that the services to provide broad functional skills to students of the District, are provided in Public School settings as well as the setting that would be present at the proposed placement at the Missouri School for the Blind. (Tr. p. 398)
22. Student would be better served and have a better chance for additional progress in gross motor skills, given her individual disabilities and functional level, by a more intensive physical therapy environment than that which has been provided by District. (Tr. pp. 390, 393-394)
23. District witness, Ms. Lewis, testified that the District cannot provide the services outlined in the January/February 2004 IEP dated March 29, 2004 (Tr. p. 481), but conflicting testimony of other witnesses prevailed upon this Panel's opinion such that if the proper evaluations are conducted, and the proposed March 29, 2004 IEP implemented, minus the placement change to MSB, student may still be able to benefit from her special education and services in the Least Restrictive Environment at District.
24. Student has made progress, albeit in some cases minimal, under the proposed March 29, 2004 IEP, since it has been implemented under the Child Complaint order of DESE, in her physical therapy goals. (Tr. pp. 380-381)
25. District provides OT, PT, vision and adaptive PE special services to other students qualifying for the same. (Tr. pp. 398,432)

26. In the expert opinion of Dr. Phillip Ferguson, Petitioner's witness, District could offer the services recommended for Student in the IEP of March 29, 2004, the report(s) of Jane Herder, the report of Dr. Rice and the visual evaluation most recently conducted for Student. (Tr. pp. 219-220)
27. There is nothing in the records of Student that indicate District could not provide appropriate individualized education and services for Student in a self contained classroom in a District School. (Tr. p. 221)
28. Student has not been conclusively shown to be unable to benefit from services which can be provided to Student by District, and peer proximity, if not literal interaction on a regular basis at this time, has a possibility, which to date has not been explored to the satisfaction of this Panel, of benefiting Student and/or allowing the Student to progress to more non-disabled peer interaction in the future. (Tr. pp. 233-236)

### **CONCLUSIONS OF LAW**

1. This case arises, and this Panel has jurisdiction to decide this matter under the Individuals with Disabilities Education Act, 20 USC Sections 1400 et seq.; and IDEA's implementing regulations at 34 C.F.R. Part 300; Missouri's special education statutes at Sections 162.670-162.999 RSMo 2004; and the Missouri State special education regulations at 5 C.S.R. Section 70-742.140.
2. Student is a "child with a disability" as that term is defined in the IDEA and its supporting regulations. 34 C.F.R. Section 300.7.
3. Student is "severely handicapped" under Missouri law at Section 162.675.3 RSMo.
4. Student is diagnosed with Tuberous Sclerosis, Intractable Minor Epilepsy with mental retardation, and Cortical Visual Impairment. (Resp. Ex. 5A, 20)
5. Student is now and has been at all times relevant to this cause, a resident of District as defined by Section 167.020.2.1 RSMo.

6. District is a Missouri School District organized pursuant to Section 162.571 et seq. RSMo.
7. IDEA and its implementing regulations and Missouri Statutes and Missouri's implementing regulations for IDEA (State Plan Part B) require that disabled students be provided with a "free appropriate public education" (FAPE). Section 162.670 RSMo.
8. The Federal Law (IDEA) defines FAPE at 20 U.S.C. Section 1401(a)(18).
9. The support services and curriculum of a disabled student must comport with a particular student's IEP. Lagares v. Camdenton R-III School District, 68 S.W.3d at 518, 523 (Mo. App. W.D. 2002)
10. The burden of proof in this case lies with District to show that it has provided FAPE for Student. E.S. v. Independent School District, 196, 135 F.3<sup>rd</sup> at 566, 569 (8<sup>th</sup> Cir. 1998)
11. The burden of proof also lies with District to show that any proposed change of placement is appropriate for any individual student. Fuhrmann v. East Hanover Board of Education, 993 F. 2<sup>nd</sup> at 1031, 1034-1035 (3<sup>rd</sup> Cir. 1993) and Heather S. v. Wisconsin, 125 F. 3<sup>rd</sup> at 1045, 1057 (7<sup>th</sup> Cir. 1997)
12. Disabled and severely disabled students must, to the maximum extent possible, be educated along with students who do not have disabilities and shall attend regular classes. This requirement is commonly known as an educational setting in the "least restrictive environment". Section 162.680.2 RSMo Disabled and severely disabled students may be removed from the regular educational environment only when the nature or severity of the disability of the student is such that education in regular classes with the use of supplementary aids and services cannot be achieved satisfactorily. (Id.)
13. School Districts have the "affirmative obligation" to "supplement and realign their resources to move beyond those systems, structures, and practices which tend to result in unnecessary segregation of students with disabilities". District has not put forward enough credible evidence that it has complied with this mandate, nor that it has fully implemented the changes included in the DESE Child Complaint finding, or the proposed IEP dated March 29,

2004, which, to our understanding, was a result thereof. Oberti v. Board of Education, 789 F.Supp. 1322, 18 IDELR 951 (D.N.J. 1992), decision on the merits, 801 F.Supp. 1392, 19 IDELR 423 (D.N.J. 1992) affd., 995 F.2<sup>nd</sup> 1204, 19 IDELR 908 (3<sup>rd</sup> Cir. 1993)

14. District has not fully implemented portions of the March 29, 2004 proposed IEP, and has not fully complied with IDEA notice provisions and school record access provisions. The recommendations of its own evaluation professionals and those of other evaluation professionals of which District was aware have not been fully attempted or implemented. Thorough and timely assessment of Student in all areas of potential import to the construction of a balanced and potentially additionally beneficial IEP, to be administered at the District as opposed to the separate placement proposed, has likewise not occurred. District has not carried its burden of proof that additional knowledge of the nature of Student's disabilities, or the full implementation of the services that have been proposed, suggested or that might be suggested following the result of additional assessment of Student will not lead to an improvement in the progress of Student. Therefore, it is the unanimous conclusion of this Panel that Student has been denied FAPE during the two year period preceding the filing of the instant Due Process Request, to the present; and that the burden of proving that the separate placement of Student proposed by District at the Missouri School for the Blind is the appropriate least restrictive environment for this Student has not been met.

## **DECISION**

This Panel's unanimous decision, based upon the above findings of fact and conclusions of law, is basically in favor of the Student. Mindful of the statute of limitations applicable in this instance, we will go back two years from the filing of the Due Process request of the Student for purposes of awarding Compensatory Education.

This Panel has decided that the Student shall receive all services included in the proposed IEP dated January 6, 2004, January 13, 2004, February 10, 2004 and March 29, 2004, which shall be implemented by District and designated the Student's current placement, excepting the transfer to the Missouri School for the Blind. We find the transfer to the Missouri School for the Blind to be in contravention to Least Restrictive Environment standards of the IDEA and its implementing regulations, and that further evaluation of Student is necessary. Implementation of the IEP criteria included in that approved (above) by this Panel, along with comprehensive Occupational Therapy and Physical Therapy assessments or evaluations, which are to include Sensory assessment/evaluation if any portion of the OT/PT evaluations indicate a need or reason to believe there is a need for Sensory assessment/evaluation, shall also be initiated/conducted at the earliest practical time, not to exceed thirty days from the date of this decision. If not included within the IEP adopted (above), the Student shall also receive a functional behavioral assessment within the same time frame as the other evaluations mentioned. Also, if not already included within the IEP adopted (above), District will formulate a behavior management plan for Student, tailored to her specific diagnoses.

The District shall attempt to localize all services ordered herein, including but not limited to a curriculum which is functional in nature, at least to the point consistent with the Student's individual needs. Any assistive communicative device utilized by District to facilitate Student shall be composed in both the English and Bosnian languages. Any and all communication between District and Student's parents shall also be composed in both the English and Bosnian languages.

Student shall also receive Compensatory Education, both functional and educational as the IEP team may decide appropriate for Student after all assessments and evaluations ordered herein are completed, received, copied to Student's family, and further IEP meetings are conducted. Taking into account the Statute of Limitations pertinent to this Decision, and due to the perceived failures of District to provide FAPE to



the student from April 22, 2002 to April 22, 2004, the Compensatory Education to which Student is entitled in this Panel's opinion is 203 hours of classroom instruction, 14 hours of speech and language therapy, 6.5 hours of physical therapy and 7.5 hours of occupational therapy. The Compensatory Education ordered herein shall be supplied during the normal school year and in the Extended School Year as appropriate and reasonably convenient for both parties. Special services to be delivered during the ESY's shall include but not be limited to, Speech and Language Therapy, Occupational Therapy, Physical Therapy, and additional classroom instruction. Student shall receive Extended School Year services each summer, unless and until an IEP is created and approved which deletes this service.

**IT IS SO ORDERED, BY THE THREE MEMBER PANEL CONVENED TO DECIDE THE MATTER ABOVE-STYLED, UNDER RSMo SECTION 162.961, THIS \_\_\_\_ DAY OF AUGUST, 2004.**

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**David Potashnick, Panel Chairperson**

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**Ms. Leora Andrews, Panel Member**

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**Mr. Rand Hodgson, Panel Member**

#### **APPEAL PROCEDURE**

**PLEASE TAKE NOTICE** that these Findings of Fact, Conclusions of Law, Decision and Order constitute the final and complete Decision of the Department of Elementary and Secondary Education of the State of Missouri in

this matter, and you as a party have a right to request review of this decision pursuant to the Missouri Administrative Procedures Act, Sections 536.010 et seq. RSMo. Specifically, Section 536.110 provides in pertinent part as follows:

- “1. Proceedings for review may be instituted by filing a petition in the Circuit Court of the County of proper venue within thirty days after the mailing or delivery of the notice of the Agency’s final decision...
3. The venue of such cases shall, at the option of the plaintiff, be in the Circuit Court of Cole County, or in the County of the plaintiff or one of the plaintiff’s residence...”

**PLEASE TAKE NOTICE** that you also have a right to file a civil action in Federal or State Court pursuant to the IDEA. See 35 C.F.R. section 300.512.